1965

Weyher Construction Company v. Utah State Road Commission : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

WEYHER CONSTRUCTION COMPANY,

Plaintiff and Appellant,

vs.

UTAH STATE ROAD COMMISSION,

Defendant and Respondent.

Case No. 10307

BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial District Court for Salt Lake County Honorable Merrill C. Faux, Judge

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STATEMENT OF THE KIND OF CASE

This is an action brought by Weyher Construction Company, appellant, against the State Road Commission for $15,667.12 extra costs incurred because of the inadequacy of the plans and specifications, and for payment of $1,850.00 wrongfully withheld as liquidated damages.

DISPOSITION IN LOWER COURT

The trial court held that the plans and specifications were adequate and that the plans were modified and the extra costs incurred at the instance of Weyher, awarding judgment in favor of the State Road Commission. The lower court awarded judgment in favor of Weyher in the amount of the $1,850.00 held by the State Road Commission as alleged liquidated damages.

RELIEF SOUGHT ON APPEAL

The general contractor, Weyher, appellant herein, seeks reversal of the judgment of the trial court in favor of the Road Commission and against Weyher on the claim for extra costs.

STATEMENT OF FACTS

Weyher Construction Company, appellant herein, as general contractor, entered into a contract with the Utah State Road Commission to rebuild a storm drain running West from Third West to Fifth West on Thirteenth South Street. (Exs. 1-P, 2-P). The original plans and specifications required Weyher to tear out the existing concrete storm drain, which was 8'6" wide by 7' high, and to construct a new concrete storm drain 10' wide by 6' high.

The original plans, *before modified,* required Weyher to remove the old storm drain, thereafter to form for

the new concrete drain, and to pour the concrete in the forms in the trench. This forming and pouring of concrete would have substantially filled the trench with various construction materials. (R. 59, 60). Thus the storm water ordinarily coming down the Thirteenth South storm drain from Parleys, Emigration, and Red Butte Creeks and the East portion of the city had to be diverted around the area of construction while construction was under way. (R. 236; Ex. 1-P).

Running parallel to the storm drain and about 6 feet South thereof is a 60-inch diameter round concrete storm sewer which was constructed in 1952. (Ex. 2-P, Sheets 2, 3, 4 and 5). In order to divert the water around the construction area, the specifications provided for the use of said 60-inch storm sewer. The particular specification is found on Sheet #10 of the specifications (Ex. 1-P), as follows:

"Special Construction Conditions

"The complete construction of this project shall be performed only during the months of August, September or October.

"The Contractor shall divert the flow from storm drain that is to be removed. This diversion may be accomplished by means of an existing cross connection to a parallel 60-inch storm drain in the vicinity of First West Street. The diversion shall be removed upon completion of this project.

"Separate payment will not be made for constructing and removing the diversion. The cost thereof shall be included in other items of work."

Generally, Weyher claims in the law suit that it was entitled to rely on the use of said 60-inch storm sewer in diverting the storm waters around the construction project and that since the 60-inch drain was inadequate to handle the water, the plans and specifications were, therefore, inadequate. (Pre-trial Order, R. 19).

The Road Commission generally claims that the specifications do not constitute a representation as to the adequacy of the 60-inch line to handle the storm water and that, therefore, the specifications are not defective. (R. 19, 20).

Shortly after the project began, Weyher constructed the required diversion dam to divert water around the project and down the 60-inch storm sewer. (R. 62-68). (See Exhibit 7-P, showing relative locations of the 60-inch line, the storm drain under construction, and the diversion dam). The 60-inch line was inadequate, however, and would not accommodate all of the water coming down the storm drain. The dam broke, sending water down the storm drain. (R. 62-68, 119-121). Thereafter, on several occasions, the dam either broke or had to be lowered in order to prevent water backing up to the East, and such breaking or lowering permitted the water to flow through the construction area of the storm drain, all because of the inability of the 60-inch storm sewer to carry the water. (R. 63, 69, 92, 119-121, 136, 137).

When the dam held, water backed up into businesses

and street areas East of the project. When the dam broke or was lowered water coursed down the construction area with great force sufficient at one time to move a Caterpillar tractor several feet. (R. 92, 119-121).

After the first flooding and dam breaking, a conference was held with the Road Commission and its representatives to attempt to solve the problem. (R. 64, 283-286). Weyher suggested some solutions in these conferences, as did the Road Commission. (R. 72, 137-139). (Ex. 5-P). The Road Commission's suggestions were deemed impractical and too costly for reasonable consideration. (R. 137-138). The Road Commission, pursuant to a suggestion of Weyher, prepared preliminary sketches for a change in the design of the construction of the storm drain. (Ex. 8-P). This preliminary sketch was delivered to Weyher September 5, 1961. (Ex. 5-P, letter dated September 7, 1961). The final modified plans (Ex. 6-P) were delivered to Weyher on or about October 11, 1961. (R. 82).

The modified plans provided for prefabrication of the sides and top of the storm drain at an off-jobsite location. The modified plans thus eliminated construction of the formwork and pouring of concrete down in the trench. The modified plans permitted the job to proceed without placing the construction material in the trench in jeopardy of being washed down the drain wherever the 60" drain was inadequate. (R. 78, 85-88, 276-281).

The modified plans required a wider trench and different construction methods. (Ex. 6-P (R. 162, 163). The project thereupon continued to completion under the modified plans. The parties sent letters back and forth, each maintaining its respective legal position regarding the adequacy of the plans. (Ex. 5-P).

Weyher was thus able to proceed notwithstanding the fact that the 60-inch line was inadequate, whereas without the modified plans, the project could not have proceeded without extreme risk and extensive delay and extra cost greatly in excess of the actual costs incurred. (R. 100-102, 276-281).

Weyher, in proceeding with the work under the modified plans, incurred additional costs of $15,667.12, which it would not have incurred under the original plans—had they been adequate. (Ex. 4-P) (R. 39, 40, 85). The Road Commission stipulated to these costs and their reasonableness. (R. 85). The Road Commission, however, denied liability for these costs (R. 40) and maintained that the plans and specifications were adequate and that the change was merely for the convenience of Weyher and at its request. (Ex. 5-P). The trial court upheld the Road Commission in this interpretation of the contract. (R. 27, 28).

If the 60-inch drain had been adequate, Weyher would not have incurred the costs which are subject of this law suit because the water would have been adequately diverted around the project site without further complication. (R. 88).

The rain which caused the flow of water down the storm drain during the period in question was caused by the usual summer thunder showers to be expected in the area, according to the weather reports for the past years 1955-1961. (Exs. 16-P and 17-P) (R. 268-275). The trial court made no finding or conclusion on the extent of these rains. These exhibits are the only competent evidence in this regard.

The Road Commission withheld $1,850.00 as liquidated damages because the project was not completed on time. (R. 182) (Ex. 13-D). The delay for which said damages were withheld occurred during the period between the state's preparation of the preliminary sketch and delivery of the amended plans. The lower court gave judgment, directing that the liquidated damages be released and paid to Weyher.

ARGUMENT

I.

THE COURT ERRED IN HOLDING THAT THE PLANS AND SPECIFICATIONS FOR THE CONSTRUCTION OF THE STORM DRAIN WERE ADEQUATE.

A. THE PLANS AND SPECIFICATIONS WERE UNQUALIFIED REPRESENTATIONS OF THE ADEQUACY OF THE 60" DRAIN.

The specification involved is:

> *"Special Construction Conditions*
>
> "The complete construction of this project shall be performed only during the months of August, September or October.
>
> "The Contractor shall divert the flow from storm drain that is to be removed. This diversion may be accomplished by means of an existing cross connection to a parallel 60-inch storm drain in the vicinity of First West Street. The diversion shall be removed upon completion of this project.
>
> "Separate payment will not be made for constructing and removing the diversion. The cost thereof shall be included in other items of work."

Weyher was entitled to rely upon this specification as providing a means of diverting the water around the project. The specifiction *requires* the Contractor to divert the water around the storm drain. Attention is directed to the wording, "The Contractor shall divert the flow . . .". Thus under the specifications, the Contractor had no alternative but to divert the water around the construction (R. 137). This did not contemplate running the water through the construction, either in a free flow or in any type of flume or pipe. It clearly requires the water to be diverted around the storm drain, and necessarily so because the construction, including forming and pouring, was to be right in the trench. (R. 59, 60).

The second sentence of the specification is: "This

diversion may be accomplished by means of an existing cross connection to a parallel 60-inch storm drain in the vicinity of First West Street." This sentence, therefore, offers to the Contractor a means of accomplishing the absolute requirement evidenced in the first sentence by the words "shall divert". This second sentence in no way indicates that the 60-inch drain may only be partly adequate, but rather indicates clearly that this is a method of accomplishing the required diversion. (R. 137). The Contractor, Weyher, was entitled to rely upon the adequacy of the 60-inch storm drain as a means of accomplishing the diversion. At such time as the 60-inch storm drain proved itself inadequate to handle the water, this specification became inadequate and required a modification.

Neither the subject specification nor any of the other specifications in any way indicate that the 60-inch drain could or should be used in connection with other means to accomplish the required diversion. The Contractor was permitted to use this 60-inch drain if it elected to do so and thus this permission constitutes an offer or representation by the Owner that the 60-inch drain was adequate. It would be strange indeed to contend that this representation did not mean what it says and that it did not indicate that the 60-inch drain could accomplish the diversion. To the contrary, the representation is clear that the diversion could be accomplished by means of the 60-inch drain. If the state had any other intent, it should have so specified.

In addition to the specifications, the Contractor must, and did, rely upon the contract plans. (Ex. 2-P) Sheets 1 through 4 of the plans all show the location of the 60-inch drain. Sheet 5 shows the cross-section of the 60-inch drain. There is no cautionary language on these plans in any way warning the Contractor that the 60-inch drain is inadequate to carry the flow. Nowhere in the specifications is the Special Construction Condition on Sheet 10 qualified or in any way modified by any restrictive language. There is no conflict between the specifications and the plans. There can be no question but that the specifications represent that the water *must* be diverted and *can* be diverted through the 60-inch drain.

The specification in question is on Page 10 of the Special Provisions of the contract, and is designated as a "Special Construction Condition." Obviously the very purpose of a Special Construction Condition is to cover a particular construction problem with specific instructions. These specific instructions must as a matter of law be given precedence over the General Construction Provisions in the contract. *Erickson v. United States,* 107 Fed. 204, 9th Cir.; and *Hollerbach v. United States,* 233 U.S. 165.

The handling of the water was a special problem, requiring a special construction specification. This special specification prescribed the particular months during which construction would be undertaken in order to take advantage of the lesser amount of storm water

to be diverted. This specification absolutely required the water to be diverted around the construction area. The specification also established a means for diverting the water, designating the location of the diverting dam as being two blocks East of the project. The specification further required the Contractor to include the cost of constructing said diversion dam in his costs for other work on the project. Everything points to a definite specification relating to the manner of construction.

Even the Architect-Engineer for the State, in a letter preceding the preparation of the plans and specifications, on March 19, 1959, gave this water matter special recognition. In this letter, he recommended to the State that the work be accomplished during the months of July, August, and September and further stated that:

> "During those three months, it is our understanding that the flow in the storm drain can be diverted to the 60-inch storm sewer which is also in Thirteenth South Street." (Exhibit 14-P, R. 248-250). (See also Ex. 15-D).

A representation in the specifications by the Owner can as a matter of law be relied upon by the Contractor. This specification relates to the means of performing the work and is essential to the completion of the project. Such a representation, therefore, impliedly, if not expressly, warrants the sufficiency of the matters represented in the specification. Should this sufficiency be inadequate, then it necessarily follows that the express

or implied warranty is breached. See *Montrose Contracting Company v. County of Westchester,* 2d Cir. 80 F. 2d 841, Certiorari Denied, 298 U.S. 662; *Railroad Water Proofing Corporation v. United States,* 137 F. Supp. 713; and, *Atlantic Dredging Company v. United States,* 253 U.S. 1.

The State, during the trial, contended that the word "may" in the second sentence of the second paragraph of said Special Construction Condition, precluded the Contractor from relying absolutely upon the 60-inch storm drain, and further argued that this word merely permitted the Contractor to use the 60-inch drain without representation as to its carrying capacity. Appellant submits that this argument is obviously contrary to the overall intent of the specification and is further unsupported by law. To the contrary, the courts hold that even though a method is made available to the Contractor, thus permitting him to undertake other alternates, he is entitled to rely upon the adequacy of the stated method set forth in the specifications. In *F. H. McGraw v. United States,* 82 Fed. Supp. 338, the specifications provided that a temporary electric power source *would be available* at no cost to the Contractor in the immediate vicinity of the contemplated work. Admittedly, the Contractor was not required to use that source of electricity. As a factual matter, the power was not available in the immediate vicinity, and the Court, in discussing this specification, held that this was a representation upon which the Contractor was required to rely. Again, in *Johnson v.*

United States, 153 Fed. 2d. 846, the specifications provided that gravel for crushing *was available.* In that case, the Contractor was entitled to rely upon the availability of the gravel even though there was no specific representation indicating the quantity nor requiring the Contractor to use that available source. In *United States v. Spearin,* 248 U.S. 132, the Court held that the responsibility of the Owner to furnish adequate plans and specifications is not overcome by the usual clauses requiring the Contractor to visit the site, to check the plans, and to inform itself of the requirements of the work. *Arcole vs. U.S.,* 125 Ct. Cls. 818.

It is apparent, therefore, that the plans and specifications unqualifiedly represented the 60-inch drain as an adequate means of diverting the water.

B. THE CONTRACTOR WAS ENTITLED TO RELY UPON THE SPECIFICATIONS.

Weyher was entitled to rely upon the representation that the 60-inch drain was adequate to accommodate the diversion of water. *Christie v. United States,* 237 U.S. 234; and, *MacArthur Bros. v. United States,* 258 U.S. 6.

Admittedly, under the specifications, Weyher was obligated to examine the job site, and this he did. (R. 57, 90, 91, 108, 109, 115). He observed and inspected the condition of the existing line, the condition of the 60-inch drain, and the location of the diversion dam, together with many other factors, of course. This exam-

ination, however, in no way could have put him on any notice that the 60-inch drain was inadequate to handle the diversion of the water. The Contractor is not required to question the design or the accuracy of specifications in his inspection of the job site. In *Hollerbach*, supra, the Supreme Court said: "In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity." The inspection of a job site relates to matters which are not covered by specific representations in the plans and specifications. In this case, the Contractor certainly was entitled to assume that some investigation had been made by the State prior to including the specification permitting the 60-inch drain to be used to divert the water. This investigation would not be reasonable for Weyher to make in the face of a specification which represents that the drain would handle the diversion. In other words, there was nothing to put Weyher on notice that the drain was inadequate.

The responsibility for the accuracy of the plans and specifications rests with the State as the party preparing and furnishing said plans and specifications. The Contractor is never obligated to check for defects in the design criteria employed by the Owner in the preparation of the plans and specifications. The Contractor has a short period of time within which to bid a project. The State has many months or even years of engineering investigation which precedes the final preparation of plans and specifications.

C. THE 60-INCH DRAIN WAS INADEQUATE AS A MEANS OF DIVERSION.

On several occasions when the storm drain water was diverted into the 60-inch drain by the diversion dams the 60-inch drain would not handle the water. (R. 62-68, 119-121). In one instance, in order to prevent backing-up of the water East of the project, it was necessary to remove part of the dam and let the water flow down the construction site. (R. 62-63).

The very purpose of the storm drain and the reason it is designated as such obviously is to handle the storms contributing to the run-off from the Eastern portion of the city down the Thirteenth South drain and into the Jordan River. In its specification, the State required the project to be performed during August, September or October. It was reasonable to expect that the State's architects and engineers were familiar with the types of storms which would reasonably be expected during these months. In making provision for the diversion of this flow, the State could be expected to prescribe a means of accomplishing the diversion which would work. Although the Road Commission witnesses testified that the 60-inch drain was intended to accomplish the diversion only if the water was not augmented by any s torms, such an argument seems to have little merit. If the specification is to have any meaning at all, it must have been intended to provide a means for diverting the storms reasonably expected during August, September and October. The 60-inch

drain did not meet these expectations and thus the specification was inadequate.

In any event, the evidence shows without contradiction that there were no unusual storms during the construction period. Weyher introduced the Daily Precipitation Records of the Weather Bureau for August, September and October of the years 1955 through 1961. (Ex. 16-P). From the Daily Precipitation Records, Weyher prepared a summary to show that during these three months in past years, a pattern of summer storms developed and could reasonably have been expected in 1961. Exhibit 17-P shows the rain fall percentages of 1-inch. For example, in August of 1957, there was rain fall of 72 hundredths of an inch at Mountain Dell, and 22 hundredths of an inch at the University; in 1959, there were four separate summer storms; in 1960, there was one storm; and, in 1961, there were three storms. The same comparison can be made for the other months of September and October, showing that during this period of the year, it is reasonable to anticipate summer storms. A summer storm is not, therefore, an unusual flooding condition which would not be covered by the specification in question. The trial court ignored the problem, making no finding or conclusion thereon.

II.

THE COURT ERRED IN HOLDING THAT THERE WAS NO MISREPRESENTATION IN THE PLANS AND SPECIFICATIONS

AND THAT THE PARTIES HAD EQUAL KNOWLEDGE OF THE CONDITIONS.

This holding is immaterial in any attempt to relieve the State from the responsibility of preparation of the plans and specifications. The Road Commission has the obligation in preparing plans and specifications, to adequately investigate the construction conditions and to accurately represent to the Contractor the construction requirements as well as design factors in order that the Contractor can with confidence rely on said plans and specifications. The Contractor admittedly has the obligation of inspecting the project site and this was done by Weyher. However, Weyher is not required to attempt to determine whether or not there are errors in the specifications, nor is Weyher required to change, modify or question the design responsibility of the Owner. See *Guyler v. United States,* 314 F2d 506 (1963); and *United States v. Utah N. & C. Stage* Co., 199 U.S. 414, 424, wherein the Court states:

> "The obligation to examine the site did not impose upon him (contractor) the duty of making a diligent inquiry into the history of the locality with a view to determining at his peril whether the sewer specifically prescribed by the Government would prove adequate. . . "

Obviously, the Road Commission in this case could reasonably be expected to provide a specification capable of performance. The preliminary investigation necessary to make this specification would be no different from the preliminary engineering work

required before preparation of technical portions of the plans and specifications. In either event, the design responsibility and the accuracy responsibility are placed upon the Owner as the party preparing and guaranteeing these plans and specifications. Any ambiguity, of course, is construed against the party preparing the plans and specifications. This design responsibility is not eliminated under a theory that the Contractor has the same means to gain the background knowledge as does the Owner. Although the Contractor may have had means to undertake the cross-sectioning of the 60-inch drain, to ascertain the quantity of water which the drain would hold, to compute the quantity of water which might come down in any particular storm, or to do any other engineering investigation, the law does not place upon the Contractor the legal obligation to do this work. The Contractor has neither the time nor facilities to do this in the preparation of his bid. The Contractor is required to notify the Owner of any apparent discrepancies in the plans and specifications, but in no way is it required to undertake a check of the Owner's design factors. *Spearin v. United States,* supra; *Hollerbach v. United States,* supra.

Therefore, the holding that the Contractor had the same knowledge or the means to gain the same knowledge as the State is meaningless under construction law principles. Furthermore, such a holding is so general that it has little, if any meaning in this case.

III.

THE COURT ERRED IN HOLDING THAT THE CHANGE IN THE PLANS AND SPECIFICATIONS WAS REQUESTED BY WEYHER.

About August 14 ,1961, when the first diversion dam was washed out, Mr. Kennelly, State's Resident Engineer, was contacted and the problem of the inadequacy was presented to him. He thereafter, at a meeting with Jack Skewes, Chief Construction Engineer, Mr. Kennelly and representatives of the Contractor, discussed the problem of the 60-inch drain. (R. 65). At this time, the State agreed that the water could not go down the project if construction was to proceed. The State suggested two alternatives: (a) Constructing a large pipeline to run down the trench to carry the water and to work around this pipeline; and, (b) to construct a ditch to the North of the project down which the water could be diverted. These two alternatives were deemed impractical, as being too expensive and also contrary to the regulations of Salt Lake City. (R. 137-139). Weyher also suggested an alternative which involved prefabrication of the sides and top of the storm drain at a fabrication point off the job site. This suggestion was accepted by the State and preliminary plans were drawn by the State's engineer, Mr. Sargent, at the direction of Mr. Skewes. (R. 139 (Ex. 8-P and 5-P).

Following this first conference and continuing

throughout the course of the contract, various letters were written back and forth between the parties, wherein the problem was fully discussed. The Contractor in essence directed the State's attention to the problem, denied responsibility for the design and requested a change order be issued to remedy the impossible situation. The State, in these letters, essentially directed Weyher to proceed and denied responsibility upon the theory that the plans were adequate and that any deviation therefrom would be at Weyher's election. The pertinent letters are listed below in substance to show that Weyher did not voluntarily assume the costs of the inadequate specifications, but rather was required to proceed in the face of impossible specifications:

(a) Weyher's letter of August 18, 1961, indicating that the plans were inadequate, suggesting the possibilities for curing the problem, and requesting information on how to proceed.

(b) The State's memorandum of August 25, 1961, denying the specifications were inadequate and completely ignoring the problem.

(c) The August 31, 1961 letter from Weyher's attorney, again indicating the inadequacy of the specifications, the Contractor's proceeding under protest, and the fact that Weyher could not assume design responsibility.

(d) The September 7, 1961 letter from Weyher to the State, referring to the preliminary sketch

of the engineer and further referring to prior correspondence as a condition of further procedure.

(e) The September 12, 1961 letter from the State, indicating that Weyher is to proceed provided that no conflict with the plans would result. Obviously, Weyher could not proceed under the existing plans without conflicting therewith, and just as obviously, the State, in approving the preliminary sketches a week earlier, had recognized this problem.

(f) The September 18, 1961 letter from Weyher to the State, stating that the State is responsible for the extra costs to be incurred, is responsible for the redesign of the storm sewer under the supplemental plans, requesting an extension of time, and estimating that the extra cost would exceed $12,000.00.

(g) The memorandum of September 19, 1961, in which the State discusses the right of Mr. Weyher to proceed at his own election. Obviously, this election is meaningless, in that it was impossible to proceed under the original specifications.

(h) The September 19, 1961 letter from the State to Weyher, denying responsibility for increased costs, but permitting a claim for additional costs to be submitted in the future.

(i) The September 21, 1961 letter from Weyher, indicating that it would proceed, but would submit claims for additional costs.

(j) The October 6, 1961 letters to and from Weyher, relating to the fact that the amended plans had not been received.

From these letters and from the testimony concerning the meetings between the parties, it is apparent that both the State and Weyher were each asserting their respective claims or defenses and were agreeing that the matter could be resolved in the future. It is apparent that the inadequacy of the 60-inch drain posed an impossible situation upon the Contractor. The State suggested remedies, as did Weyher, and the most expedient, reasonable and practical method was adopted. The State now seeks to evade responsibility upon the theory that since Weyher made the suggestion which was finally accepted, that Weyher was a volunteer and had assumed all costs incurred in remedying the problem. It is evident that Weyher followed the contract procedures of notifying the State of the problem, suggesting remedies, asking for a change order and indicating an estimate of the increased costs, all prior to any action on the part of the State or Weyher. The State cannot refuse to issue a change order, but at the same time agree to a means of remedying inadequate specifications on the pretext that any action undertaken by the Contractor is voluntary. The State superficially and without just cause, refused to assume its obligation under the contract of ordering a change therein. This refusal is just as superficial as was the State's tenacious holding to the very end that Weyher was in default in the time requirements and would have

to be assessed liquidated damages. On October 30, 1961, the State completely ignored the fact that it had failed to provide Weyher with the amended plans from September 5, 1961, and in said letter, assessed Weyher with liquidated damages for this entire period. (Ex. 5-P) (R. 174, 175, 195, 206).

The inadequate plans cannot be remedied by a claim against the Contractor that he is voluntarily assuming the costs of performing according to amended plans authorized by the State. The fact remains that the Contractor actually performed the work at an admitted increased cost and pursuant to the change in the plans and specifications approved by the State because said plans had to be amended in order to prove workable. The State seeks refuge behind a technicality, which in fact does not exist.

SUMMARY

The representation that the 60-inch line would carry the diverted water was erroneous. The Contractor very obviously bid the project in reliance upon said specification. Had it been able to perform in accordance therewith, it would not have incurred the additional costs of $15,667.12. The inadequacy of the 60-inch drain specification caused an impossible construction situation. It also caused a dangerous as well as costly flooding situation to the East of the project. The State in effect required the Contractor to proceed to cure said discrepancies and, in so doing, the Contractor

incurred the additional costs. The flooding was eliminated and the construction was completed in the most reasonable and practical as well as timely method possible. The State, in fomenting a confused and impractical situation, should bear the reasonable cost resulting from its inadequaite specifications.

The State should have known of the capabilities of the 60-inch drain, and in requiring the contract to be performed during the summer months, should have made adequate provision, since this was its apparent intent, for the handling of the waters ordinarily expected during the summer storms. As a matter of fact, the drain would not handle these ordinary summer storms and the Contractor, to cure this problem, was required to incur the additional costs. Either on a change order basis, on a damages theory, or upon the theory of quantum meruit, whereby the State has received the admitted and reasonable benefits of the Contractor's work, the Contractor should not now be required to bear the financial burden of the State's incompetent specifications.

The judgment of the lower court should be reversed and judgment granted for the agreed and reasonable costs of $15,667.12.

Respectfully submitted,

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